Filed 4/23/19 P. v. McCarthy CA4/1

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. DONALD MCCARTHY, Defendant and Appellant.	D075140 (Super. Ct. No. 16CR005996)

APPEAL from a judgment of the Superior Court of San Bernardino County, Bridgid M. McCann, Judge. Affirmed.

Ronda G. Norris, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Lise Jacobson and Robin Urbanski, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Donald McCarthy was convicted of the second degree murder of his neighbor Robert B. McCarthy's defense at trial was that he shot the victim in self-

defense or, at most, that he was guilty of voluntary manslaughter based on imperfect self-defense. To support his claim of self-defense, McCarthy sought to introduce testimony under Evidence Code[1] section 1103, subdivision (a)(1), to show the victim exhibited a "violent attitude" toward a third party earlier the same day of the incident. Although McCarthy was not aware of the victim's earlier conduct, the defense contended it was relevant to show the victim was acting in conformity with his character trait (of having a "violent attitude") during the shooting incident. McCarthy contends the trial court prejudicially erred in excluding the proffered testimony under sections 1103 and 352. We disagree and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

During the early afternoon of March 22, 2016, McCarthy fired three shots from his handgun, killing his neighbor Robert. One bullet hit Robert in the chest, another bullet hit him in the head, and another bullet missed. McCarthy's defense at trial was that he shot the victim in self-defense. The jury heard testimony from several witnesses in the neighborhood, from law enforcement officials, and from defendant and his son.

A. *Witness Testimony*

Several witnesses testified about the gunshots they heard and their other observations relating to the shooting incident. David R. was mowing his lawn when he heard three gunshots spanning up to 14 seconds—about three to five seconds elapsed between the first and second shot, and about five to seven seconds passed between the

---

1 All further statutory references are to the Evidence Code unless otherwise noted.

second and third shots. Immediately after hearing the first shot, David heard screams for help: " 'Help, help.' Maybe, 'somebody help.' I heard 'help' multiple times." A couple of seconds after the third shot, David saw a male climb out of a bend in a fence surrounding an empty lot. The male walked "with purpose" "like he was in a hurry" until another neighbor asked "something along the lines of, do you have a gun, or did you have a gun." David heard no response. David, a firefighter, called 911 and tried to help the victim who appeared unresponsive. David performed a "head to toe" assessment and observed two gunshot wounds and what appeared to be brain matter.

Another neighbor, Rogelio D., responded to the scene and helped David by performing chest compressions on the victim as directed by David. Before responding, David had heard a loud sound, then he "heard 'help me' and then 'someone please help me' " within seconds of the loud sound. Rogelio then heard another "bang" within a couple of seconds of the cry for help. Rogelio walked outside his back door, thinking someone had blown up a firecracker in their hand. Rogelio then heard a third shot and realized it was a gunshot. Between 30-60 seconds passed between the second and third shots. Rogelio heard no voices after hearing the cry for help following the first shot. When Rogelio jumped over his fence to help David try to resuscitate the victim located on the vacant lot, Rogelio was able to see into defendant's backyard. Rogelio saw defendant talking to his son but could not hear what they were saying.

Defendant's son, Sean, was studying when he heard his father's voice and his dog "going crazy barking" at the back wall. Sean stepped outside and heard "arguing and some cussing" and then his father told him "that's the one who was spraying poison, and

it was coming into" their yard.[2] Sean went inside with the dog and then heard a gunshot, followed by two additional gunshots a few seconds later. Sean initially "froze up" then went outside a few minutes after the third shot and saw his father holding a silver revolver. McCarthy told Sean he had been sprayed in the face with poison, and his face was red like he was in pain with his eyes squinting. Sean acknowledged that when interviewed the day of the incident, he told the detective his father had said: "I killed somebody. I'm going to kill myself. I can't go to jail. I don't want to go to jail." Sean further acknowledged he told the detective his father's face was red, they both are fair skinned, they tend to get red, and he did not know if his father's face was red because it was just blushing. He did not mention at the time that his father said his face was burning or that his eyes were squinting. Sean described his father that day as "being shaken, freaking out, and in shock."

Another neighbor, Angelica H., heard gunshots and saw part of the interaction between McCarthy and the victim. Angelica saw the victim spraying weeds as she pulled up to her home. While unloading groceries from her vehicle, Angelica heard the victim say "fuck you" to the defendant but she did not hear any arguing between the two before that. When Angelica turned around to face the direction where she had seen the victim, she saw the defendant shoot him. Angelica could see the upper part of defendant's body from the waist up, including his head, part of his shoulders, and his hands as he leaned

---

[2] Sean described the voices as "mostly bickering both back and forth." He could not hear exactly what was said, but recalls hearing something about "[g]rabbing a board to block[] the spray from coming into our yard." Both voices sounded "agitated."

over the fence while holding a gun. Angelica explained she thought the defendant was leaning over the fence "like to get a good aim because of the ivy I guess." The victim "yelled out to him, 'You shot me' " while holding onto his chest and looking down. The defendant then jumped over the fence and shot the victim again. When he jumped, the defendant landed on the ground without seeming to fall, pointed the gun at the victim, and shot him. Angelica heard one more shot as she was going back inside the house. Angelica was unable to estimate the time between shots, other than to say a couple of seconds passed from the time she heard the victim say "fuck you" and the first shot, and "seconds" passed from the time she heard the first gunshot to the time the defendant jumped over the fence. Angelica never saw the victim raise his hands or run toward the defendant. Angelica acknowledged some discrepancies in her statements and testimony at the preliminary hearing regarding the number of gunshots that she heard (three or four), the sequence of events (whether she turned around to go back inside before hearing a gunshot and seeing the victim shot), and whether the defendant jumped over the fence or fell over it. Angelica testified at trial that she was certain the defendant did not fall, but rather jumped, over the fence. She saw the defendant fire the gun again after jumping over the fence, while looking right at the victim, and her best recollection is that she turned around to go inside her house after hearing the second shot.

The final neighbor, Michael M., testified that he heard three gunshots with a pause of about three to five seconds between the second and the third shot. Michael saw McCarthy coming down the street and asked him if he heard the gunshot; defendant told

Michael to go back inside his house. Michael did not see any tears or injuries on defendant's face, or any signs of redness.

B. *Defendant's Testimony*

McCarthy testified that he was working in his yard when his dog started barking and running toward the back fence. McCarthy went inside his house to get a loaded handgun in case he needed to scare away a coyote. McCarthy encountered Robert, who was spraying weed killer in the dirt lot located behind McCarthy's home.

McCarthy and Robert got into an argument about Robert's weed killer coming over to his yard. McCarthy set his ladder up against his fence and noticed a spray or mist coming over the top of the fence. McCarthy asked Robert what he was spraying and Robert said it was "Round Up." When McCarthy said it was coming into his yard, Robert said "in a very rude tone that then you better get a board and . . . put it up." McCarthy climbed the ladder and said "hey, it's your problem to stop the poison from coming into my yard." Robert then sprayed McCarthy in the face and eyes, yelling "[f]uck you." McCarthy was temporarily blinded by the weed killer; he reached back, got the gun out of his pocket, and shot toward the direction of Robert's voice. The gun jerked, causing McCarthy to lose his balance and fall over the fence that separated his yard from the empty lot. Afraid that Robert was going to attack him, and still blinded by the spray, McCarthy raised the gun and fired a second time toward the direction of Robert's yelling. McCarthy explained that he was afraid Robert was going to kill him by smashing McCarthy in the head with a rock. McCarthy then regained his vision and thought Robert, who was still yelling, was reaching for his gun. McCarthy shot the gun a

third time. Although McCarthy heard Robert yelling after the second shot, he did not know what he was saying. McCarthy did not hear anything from Robert after the third shot. After the third shot, McCarthy saw Robert fall backwards.

McCarthy testified that he would not have fired the first shot if the victim had not "assaulted" him, and he would not have fired the subsequent two shots if he were not in fear. He has "no regret" for firing the shots because he was defending himself.

On cross-examination, McCarthy testified that when he fired the first shot, the victim was not reaching for McCarthy's gun—he just shot the victim because he had been sprayed in the eyes. McCarthy had already seen the mist from the spray before he climbed the ladder; he never told the victim he had a gun, never told him to back up, and never told him to stop spraying or he would shoot. McCarthy did not shoot into the air, ground, or anywhere other than the victim's direction, as a warning. When he was sprayed, McCarthy did not try to go down the ladder, inside the house, call 911, or call for help. Before firing the second shot, McCarthy never saw the victim with a rock in his hand and never saw him reach down for a rock. Before the third shot, the victim never actually touched McCarthy's gun. McCarthy did not stay at the scene, call 911, or tell his son that he was defending himself. McCarthy also never told the detective that he was blinded by the spray, that the victim had reached for McCarthy's gun, that he feared the victim would kill him, or that he was defending himself.

C. *Proffered Evidence of Victim's Character*

The defense made an oral motion to introduce evidence that a neighbor who lived in McCarthy's neighborhood, Alfred C., had contact with Robert on the same day that

McCarthy shot Robert.[3] Defense counsel provided the following offer of proof as to what Alfred's testimony would show.[4]

Alfred and Robert had a "history" involving a "fender bender" motor vehicle accident in 2014 that resulted in a civil lawsuit. Robert lost the lawsuit right around the time that he came to Alfred's house, unannounced and uninvited. Alfred did not come out of his house when Robert came to the door. Robert began pacing back and forth, which Alfred interpreted as "basically taunting him to come out." Robert never spoke to Alfred, and Alfred never told defendant anything about this encounter. The trial court summarized its understanding of the proffer during the following exchange:

> "The Court: He went up to speak to [Alfred]. Knocked on the door. [Alfred] chose not to come out. He paced back and forth. [Alfred] believed it to be taunting him. And that would be the totality of his testimony.
>
> "[Defense counsel]: Pretty much.
>
> "The Court: It's being offered for what reason then?
>
> "[Defense counsel]: Essentially that [Robert] was looking for trouble. They have a history. It was—violent is probably not the correct word. But violent attitude is probably the correct word to use. And that's the behavior that he exhibited at the residence that day. [¶] I asked him why he didn't open the door. He said [Robert]

---

3 The People filed a motion in limine to exclude this evidence before trial. The trial court deferred ruling to allow the defense to provide more information to show the proffered testimony was relevant.

4 The prosecutor also referred to a statement (apparently in writing) that Alfred provided to the defense investigator. Neither party provided a record citation for this statement in their briefs, and we have not been able to locate the statement in the record on appeal.

> was clearly there to intimidate and taunt him. He was about to call the police he was so scared[.]"

Defense counsel further argued the victim's behavior was relevant "because he is showing action and conformity therewith the day of and in the past." The prosecution objected that nobody really knew why the victim went to Alfred's house, the proffer was based on speculation, and the additional testimony required to refute the proffered testimony raised concerns under section 352.

The trial court excluded the proffered testimony under sections 1103, subdivision (a)(1), and 352. The court found that none of the proffered facts "factually support character or trait of character of the victim for a violent attitude or even aggressiveness." The court reasoned that the proffered testimony about Robert "taunting" Alfred or "looking for trouble" was subjective; that McCarthy was unaware of the prior incident between Robert and Alfred when the shooting occurred; and that there was no evidence proffered that Robert ever threatened Alfred, physically or otherwise. The trial court found "what has been ascribed by the offer of proof are simply one person's interpretations of actions and feelings, and neither are evidence." The trial court further concluded the proffered testimony was inadmissible under section 352, finding that the limited probative value of the evidence was substantially outweighed by the potential confusion of the issues and consumption of time. The court explained that, if Alfred were allowed to testify, that would lead to questioning on irrelevant issues such as the 2014 accident and the resulting lawsuit. Differences between Alfred's initial statement and the more detailed proffer that was later provided also would consume additional time

and lead to further questioning "into whether or not [Robert's] actions were even aggressive or violent or if [Alfred was] oversensitive due to the past legal dispute between them." After weighing the limited probative value of allowing Alfred to testify regarding his perception of Robert's attitude against the undue consumption of time and confusion of issues, the trial court excluded the proffered testimony.

DISCUSSION

McCarthy contends the trial court erred when it excluded evidence that the murder victim engaged in "aggressive and bullying behavior" against another neighbor the same day of the shooting. McCarthy claims the evidence was admissible under section 1103, subdivision (a), to support his claim that he acted in self-defense or imperfect self-defense. McCarthy further claims that the error in excluding the evidence was prejudicial because, had the evidence been admitted, there is a reasonable probability the jury would have agreed he shot the victim in self-defense.

A. *Legal Principles*

Generally, character evidence is inadmissible. (§ 1101, subd. (a).) However, "[i]n a criminal action, evidence of the character . . . of the victim of the crime" may be admissible where the evidence is "[o]ffered by the defendant to prove conduct of the

victim in conformity with the character or trait of character." (§ 1103, subd. (a)(1).)[5] Of relevance here, pursuant to section 1103, " 'where self-defense is raised in a homicide case, evidence of the aggressive and violent character of the victim is admissible.' " (*People v. Wright* (1985) 39 Cal.3d 576, 587 (*Wright*); see also *People v. Rowland* (1968) 262 Cal.App.2d 790, 797-798 (*Rowland*) [evidence of aggressive character admissible to show defendant had to ward off victim who was acting aggressively].) "[S]uch character traits can be shown by evidence of specific acts of the victim on third persons as well as by general reputation evidence." (*Wright, supra*, at p. 587.)

Admission of character evidence is still subject to exclusion under section 352 "if admitting the evidence would have confused the issues at trial, unduly consumed time, or been more prejudicial than probative." (*People v. Gutierrez* (2009) 45 Cal.4th 789, 827-828 (*Gutierrez*).) Trial courts have broad discretion to determine that evidence having some relevance to the issues at trial is nonetheless inadmissible under section 352. (*Wright, supra*, 39 Cal.3d at pp. 587-588; see also *People v. Richardson* (2008) 43 Cal.4th 959, 1008 (*Richardson*).)

We review a trial court's decision to exclude evidence under sections 1103 and 352 under a deferential abuse of discretion standard. (*Gutierrez, supra*, 45 Cal.4th at

---

[5] Section 1103, subdivision (a) provides: "In a criminal action, evidence of the character or a trait of character (in the form of an opinion, evidence of reputation, or evidence of specific instances of conduct) of the victim of the crime for which the defendant is being prosecuted is not made inadmissible by Section 1101 if the evidence is: (1) Offered by the defendant to prove conduct of the victim in conformity with the character or trait of character. (2) Offered by the prosecution to rebut evidence adduced by the defendant under paragraph (1)."

pp. 827-828; *People v. Pollock* (2004) 32 Cal.4th 1153, 1171.) "Under this standard, a trial court's ruling will not be disturbed, and a reversal of the judgment is not required, unless the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice." (*People v. Guerra* (2006) 37 Cal.4th 1067, 1113 (*Guerra*).) We do not disturb the exercise of such discretion unless the trial court's decision exceeds the bounds of reason. (*People v. Funes* (1994) 23 Cal.App.4th 1506, 1519.)

B. *Section 1103 Evidence*

We conclude the trial court properly excluded proffered testimony that the victim went to a neighbor's home, unannounced and uninvited, paced around, and left—making the neighbor feel as if the victim was "taunting" him to come out and "looking for trouble." Based on defense counsel's offer of proof, the trial court concluded the proffered testimony was not admissible to show a "character or a trait of character" within the meaning of section 1103. (§ 1103, subd. (a)(1).) After weighing the probative value of the evidence against its tendency to confuse the jury and unduly consume time, the trial court further concluded the evidence was inadmissible under section 352. We agree with the trial court's conclusions under both section 1103 and section 352.

A victim's violent or aggressive character may be relevant to prove that the victim acted in conformity with that character in a confrontation with the defendant, whether or not the defendant was previously aware of this character. (*Rowland*, *supra*, 262 Cal.App.2d at pp. 796-797; *People v. Shoemaker* (1982) 135 Cal.App.3d 442, 446-447 (*Shoemaker*).) If the defendant is aware of a victim's violent tendencies, the

victim's actions during a prior incident may also be probative of the degree and nature of the defendant's fear of the victim. (*People v. Davis* (1965) 63 Cal.2d 648, 656-657; see 1 Witkin, Cal. Evidence (5th ed. 2018) Circumstantial Evidence, § 59, p. 437 ["An accused claiming self-defense in a prosecution for homicide or assault is entitled to prove the dangerous character of the victim. If this character was known to the defendant, the evidence tends to show the defendant's apprehension of danger; if it was not known, the evidence nevertheless tends to show that the victim was probably the aggressor."].)[6] Because McCarthy admits he was not aware of the prior incident between Alfred and the victim, the proffered character evidence was potentially relevant only to show that the victim was a person prone to physical violence.

Here, the proffered evidence was of minimal, if any, probative value. According to the proffer, the victim arrived at Alfred's house uninvited, knocked on the door, and paced in front of the door when Alfred did not answer. He then left without speaking to Alfred. Although the evidence was proffered to demonstrate the victim's "violent attitude," the prior incident did not involve any apparent physical aggression, violence,

---

6 "For self-defense, the defendant must actually and reasonably believe in the need to defend, the belief must be objectively reasonable, and the fear must be of imminent danger to life or great bodily injury." (*People v. Lee* (2005) 131 Cal.App.4th 1413, 1427; see also *People v. Butler* (2009) 46 Cal.4th 847, 868 ["both self-defense and defense of others, whether perfect or imperfect, require an actual fear of *imminent* harm"].) A defendant's awareness of the victim's violent character therefore may be relevant to prove these elements.

threats, or even a verbal confrontation.[7] The trial court correctly concluded that Alfred's interpretation that the victim was "taunting" him and "looking for trouble" was "subjective," and that the witness's subjective "interpretations . . . and feelings" were not admissible. (See *People v. Babbitt* (1988) 45 Cal.3d 660, 684 ["exclusion of evidence that produces only speculative inferences is not an abuse of discretion"].) The proffered testimony had little tendency to prove that the victim had a propensity for violence or that he was the aggressor in his encounter with McCarthy. Based on these circumstances, the trial court did not abuse its discretion in concluding that the victim's actions during the incident in question were not probative to support defendant's self-defense claim. The evidence was properly excluded under section 1103, subdivision (a).

Even if the evidence was otherwise admissible under section 1103, subdivision (a), the trial court had discretion to exclude the evidence under section 352 "if admitting the evidence would have confused the issues at trial, unduly consumed time, or been more prejudicial than probative." (*Gutierrez*, *supra*, 45 Cal.4th at p. 828; see *Shoemaker*, *supra*, 135 Cal.App.3d at p. 448 ["[l]ike all proffered evidence, character evidence" under section 1103 "is subject to exclusion under [section 352]"].)

---

7 McCarthy's claim on appeal that the victim exhibited "bullying" behavior, something which was not argued before the trial court, also is not supported by the proffered evidence. McCarthy also contends there is no need to show the victim verbally threatened Alfred during the incident in question, because evidence that the victim "had previously threatened" Alfred "was enough." McCarthy cites five pages in the reporter's transcript to support his claim about these alleged prior threats but none of these pages supports his claim.

Here, the trial court conducted a thorough analysis in considering whether to admit the proffered testimony under section 352. As already discussed, the proffered testimony was of minimal (if any) probative value, and it did not factually support a finding that the victim had a character of being violent or aggressive. By contrast, the risk of consuming undue time and confusing the jury was high. As the court noted: (1) the prosecution would need to rebut the defense evidence by showing the victim did not have a character for violence; (2) the prosecution could seek to impeach Alfred's bias against the victim by introducing evidence regarding the 2014 traffic accident and subsequent lawsuit (which were otherwise irrelevant); (3) additional witnesses would be needed to discuss extraneous matters relating to both Alfred's and the victim's prior behavior; and (4) Alfred's testimony would be prolonged due to discrepancies in his statement and the need to determine whether the victim was "even aggressive or violent" or whether Alfred was merely "oversensitive due to the past legal dispute between them." Because the trial court could reasonably have concluded that allowing the proffered testimony would have necessitated undue consumption of time and distracted and confused the jurors, McCarthy has failed to demonstrate an abuse of discretion. (See *People v. Tidwell* (2008) 163 Cal.App.4th 1447, 1456-1457 ["even though the evidence was relevant and admissible pursuant to Evidence Code section 1103, the trial court did not abuse its discretion by excluding the evidence because the evidence was weak on the issue of [the victim's] credibility and would require an undue consumption of time"].)

In sum, we find nothing arbitrary, capricious, or patently absurd about the trial court's decision to exclude the proffered evidence relating to the victim's purportedly

violent attitude or character. (*Guerra, supra*, 37 Cal.4th at p. 1113.) The trial court did not abuse its discretion in excluding the evidence under either section 1103 or section 352.

C. *Harmless Error*

Even assuming the trial court erred in excluding the proffered testimony about the victim's behavior toward another neighbor the day of the shooting incident, it was harmless because McCarthy would not have secured a more favorable verdict. (*People v. Watson* (1956) 46 Cal.2d 818, 837 (*Watson*); *Gutierrez, supra*, 45 Cal.4th at p. 828 [applying *Watson* harmless error standard to a claim that evidence was erroneously excluded under section 1103].)

"It is . . . well settled that the erroneous admission or exclusion of evidence does not require reversal except where the error or errors caused a miscarriage of justice. (§§ 353, subd. (b), 354.) '[A] "miscarriage of justice" should be declared only when the court, "after an examination of the entire cause, including the evidence," is of the "opinion" that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error.' " (*Richardson, supra*, 43 Cal.4th at p. 1001, quoting *Watson, supra*, 46 Cal.2d at p. 836.) We find there was no such miscarriage of justice here.

McCarthy's theory was that he acted in self-defense or imperfect self-defense based in part on the following facts: the victim was rude, said "fuck you" and sprayed McCarthy in the face with weed killer while McCarthy was standing on a ladder which was leaning against a fence separating their properties; the spraying caused McCarthy to

be temporarily blinded; McCarthy reached into his pocket, pulled out his gun, and shot the victim; due to the gun jerking, McCarthy lost his balance, fell over the fence onto the victim's property, and landed on his feet in a crouched position; the victim continued yelling after McCarthy discharged the first shot, although McCarthy could not discern what he was saying; McCarthy thought he was in danger of getting attacked and that Robert would try to kill him by smashing McCarthy in the head with a rock, so he fired the second shot; and McCarthy thought the victim was trying to grab for his gun, so he fired the third shot.

Even if it had been admitted, evidence of what occurred between the victim and Alfred earlier the same day would not support McCarthy's claim of self-defense. The victim went to Alfred's house, knocked on the door, paced back and forth, and left without incident. He made no threats. Indeed, he never said anything to Alfred. These actions stand in stark contrast to those alleged by McCarthy—*physically* aggressive behavior which presented a threat to defendant's safety (including threatening defendant with a rock and reaching for his loaded gun even after being shot in the chest). It is not reasonably probable the jury would have accepted McCarthy's claim of self-defense, or

concluded the victim was the aggressor, even if it had been allowed to consider the proffered testimony.[8]

We reject McCarthy's claim that he was precluded from presenting a complete defense. McCarthy testified at length about the shooting incident in an attempt to establish he was acting in self-defense. The trial court instructed the jury on both of McCarthy's theories of self-defense and voluntary manslaughter based on imperfect self-defense.[9] Defense counsel argued that the evidence showed McCarthy's account was credible; that defendant's testimony was supported by the physical evidence (particularly as summarized by the pathologist); and that the individual who witnessed part of the shooting incident was not credible due to some discrepancies in her statements on prior occasions and during trial, and her potential bias. McCarthy was allowed to present a

---

8 McCarthy also could not have obtained a more favorable judgment by using the proffered evidence to show he feared the victim. As discussed *ante*, the proffered evidence was not admissible for this purpose under the facts of this case because McCarthy was not aware of the earlier incident. Defendant could not have feared the victim based on a specific incident of which he was unaware.

9 More specifically, the court instructed the jury on justifiable homicide and self-defense with CALCRIM No. 505 as follows: "The defendant is not guilty of murder or manslaughter if he was justified in killing someone in self-defense. The defendant acted in self-defense if: One, the defendant reasonably believed that he was in imminent danger of being killed or suffering great bodily injury. Two, the defendant reasonably believed that the immediate use of deadly force was necessary to defend against that danger. And, three, the defendant used no more force than was reasonably necessary to defend against that danger." The court also instructed the jury on voluntary manslaughter and imperfect self-defense with CALCRIM No. 571 as follows: "The defendant acted in imperfect self-defense if the defendant actually believed that he was in imminent danger of being killed or suffering great bodily injury. And, two, the defendant actually believed that the immediate use of deadly force was necessary to defend against the danger. But, three, at least one of those beliefs was unreasonable."

complete defense—he "merely was precluded from proving it with . . . character evidence that was not particularly probative on the question." (*People v. Jones* (1998) 17 Cal.4th 279, 305.)

To support his claim of prejudice, McCarthy contends this was a close case as shown by the length of the jury's deliberations (three full days and one hour on the fourth day) and the jury's questions. We are not persuaded by this claim. The jury heard from 13 witnesses over the course of approximately 12 days. The length of deliberations could as easily demonstrate the jury took its responsibilities seriously and was conscientiously performing its duties. (*People v. Houston* (2005) 130 Cal.App.4th 279, 301.) Although the jury requested a readback of McCarthy's testimony, the jury did not request additional information or ask any questions directly about self-defense, voluntary manslaughter, or imperfect self-defense during its deliberations.[10] After carefully considering McCarthy's testimony and the applicable instructions, the jury rejected his self-defense and voluntary manslaughter theories and convicted him of second degree murder.

The jury could reasonably reject McCarthy's claim that he harbored an actual fear that he was in imminent danger of death or great bodily injury, that it was necessary to shoot the victim multiple times to defend against any danger he allegedly presented, and that McCarthy used only that force that was reasonably necessary to defend himself. (See CALCRIM No. 505, CALCRIM No. 571.) McCarthy testified that the victim used

---

10 The jury requested clarification regarding express and implied malice, how to use direct and circumstantial evidence, and the difference between first and second degree murder.

profane language and sprayed him with weed killer. McCarthy responded by shooting the victim three times, claiming he was in fear of being attacked. McCarthy never called 911 and never claimed he shot the victim in self-defense when he spoke to his son, a neighbor and a detective immediately after the shooting incident. Instead, he told his son "I killed somebody. I'm going to kill myself. I can't go to jail. I don't want to go to jail," then wrote a letter to his family stating he feels he has "something wrong" with him "that puts all people in danger" and he "never thought it would manifest as violent, and now it has."

There is no reasonable probability that evidence of the victim pacing in front of another neighbor's home earlier the same day as the victim's murder would have made McCarthy's self-defense story more believable, or that it would have resulted in the jury reaching a more favorable verdict.

DISPOSITION

The judgment is affirmed.

GUERRERO, J.

WE CONCUR:

BENKE, Acting P. J.

DATO, J.